Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1973

No. 73-1288

ALFRED DUNHILL OF LONDON, INC.,
Petitioner,

v.

THE REPUBLIC OF CUBA and DANIEL SOLANO PINERA,
as Interventor,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

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Petitioner prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Second Circuit, entered in the above-entitled case on September 24, 1973.

CITATIONS OF OPINIONS BELOW

The opinion of the United States District Court for the Southern District of New York is reported at 345 F. Supp. 527 and reproduced in the Joint Appendix hereto at pp. 41a-75a. The opinion of the United States Court of Appeals for the Second Circuit reversing in part the decision of the District Court is reported at 485 F.2d 1355 and is reproduced in the Joint Appendix at pp. 1a-38a. A petition for rehearing, with suggestion for rehearing *en banc*, was denied on November 14, 1973. A copy of the orders denying rehearing is reproduced in the Joint Appendix at pp. 39a-40a.

Jurisdiction

The judgment of the United States Court of Appeals for the Second Circuit was entered on September 24, 1973. A timely petition for rehearing, with suggestion for rehearing *en banc,* was denied on November 14, 1973, and an extension of time to file a petition for a writ of certiorari to and including February 21, 1974, was granted by Mr. Justice MARSHALL on February 7, 1974. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

Question Presented

In the absence of competent evidence of any act of the Republic of Cuba, either within or without its territorial jurisdiction, did the mere statements by counsel for the Republic of Cuba that it would not honor Petitioner's claim for the return of money that Cuba never admitted receiving amount to an Act of State by Cuba confiscating the money and thus preventing the courts of this country from fully adjudicating Petitioner's claim on its merits?

Statement of the Case

On September 15, 1960, several manufacturers of Cuban cigars were nationalized by the Republic of Cuba. Before and for a short time after nationalization (or "intervention"), cigars manufactured by these manufacturers were shipped to three principal importers in the United States ("the importers"), including Petitioner. Most of the cigars shipped after intervention were not paid for, but several payments, intended to cover amounts owed for pre-intervention shipments, were made by the importers after intervention.

Lengthy litigation ensued. In early 1961, the former owners ("the owners"), who fled to the United States and elsewhere, sued the importers to obtain payment on all cigars shipped and sued both the importers and the Cuban government for infringing United States trademarks covering the Cuban cigars. The Cuban agents appointed to manage the nationalized businesses, called "interventors", also sought (by attempting to intervene in the owners' actions) to recover for all cigars shipped to the importers.*

The district court resolved the threshold disputes between the interventors and the owners by holding that (1) the owners could prosecute claims for trademark infringement; (2) the owners could recover for pre-intervention shipments; and (3) the interventors could recover for post-intervention shipments. These holdings were affirmed on appeal. *Palicio* v. *Brush & Bloch*, 256 F. Supp. 481 (S.D.N.Y. 1966), *aff'd*, 375 F.2d 1011 (2d Cir.), *cert. denied*, 389 U.S. 830 (1967), see J. App., 5a-6a.

During the *Brush & Bloch* litigation, it was assumed that only insignificant post-intervention payments had been made for pre-intervention shipments. Not until the respective rights of the owners and interventors had been established by *Brush & Bloch* did it become apparent that those amounts were substantial. J. App., 43a-44a. It also became apparent that those payments might well have found their way into the hands of the interventors. Since *Brush & Bloch* had determined that the owners were entitled to such payments, the importers, including Petitioner, claimed, *inter alia*, a right to recover against the interventors for any such moneys they might eventually be held to owe the owners.

The interventors' principal line of defense to this claim of the importers was to dispute that they ever received the payments. J. App., 20a-22a and 46a. During the course of trial, as proof was adduced that the interventors received these payments, counsel for the interventors suggested that its client would not honor a claim for repayment of those funds. Apart from counsel's statement, not

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* Jurisdiction was based upon 28 U.S.C. § 1332(a)(2), all parties except the importers being foreign states or citizens or subjects thereof.

a shred of evidence was adduced at trial or before the Court of Appeals to support counsel's contention that any act of the Cuban government had taken place.

After trial, the district court found, *inter alia*, that the payments for pre-intervention shipments had been received by the interventors. The court held that the importers remained liable to the owners for those amounts, with interest, but that the importers could recover those amounts, with interest, from the interventors.* The other two importers, who owed larger sums to the interventors than they had mistakenly paid them, recovered these amounts by way of set-off. Petitioner, having paid more to Cuba for pre-intervention shipments than it owed Cuba for post-intervention shipments, recovered an affirmative judgment against the interventors for the difference. J. App., 73a-75a.

The Court of Appeals for the Second Circuit reversed the holding of the District Court insofar as it granted Petitioner an affirmative judgment, thus requiring Petitioner to pay twice for the same merchandise and allowing the interventors to retain money to which they had been held clearly not entitled. The sole ground for the reversal by the Court of Appeals was that counsel's statements proved that an Act of State had taken place. J. App., 22a-26a. However, under *First Nat'l City Bank* v. *Banco Nacional de Cuba*, 406 U.S. 759 (1972), the Court held that the Act of State doctrine would bar consideration of the importers' counterclaims against the interventors only in excess of the amount of the judgments which the Cuban interventors, in turn, had against the importers. J. App., 28a-31a. Thus, the judgment was reversed only as to Petitioner, who alone had an affirmative judgment against the Cuban interventors.

*The award of prejudgment interest was challenged by all importers. Petitioner herein has joined the other importers in seeking review in this Court of that award and other issues. Such review, however, is sought by conditional cross-petition, requesting that the writ issue only if the interventors' petition is granted.

Reasons For Granting The Writ

1. The decision of the Court of Appeals that an Act of State had occurred constitutes a wholly unprecedented expansion of the Act of State doctrine in two significant respects. First, no affirmative step evidencing the exercise of soverign power was taken by any government official. Second, even if such act had occurred, the statements of counsel were not competent to prove any such act.

Every case thus far dealing with the application of the Act of State doctrine has involved an affirmative step taken by a foreign governmental authority within its territorial jurisdiction. Often the affirmative step consists of a formal decree, as in *Banco Nacional de Cuba* v. *First Nat'l City Bank of New York*, 270 F. Supp. 1004, 1009 n. 6 (S.D.N.Y. 1967), *aff'd on final appeal*, 406 U.S. 759, 760 (1972); in *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398, 401-05 and nn. 3 and 7 (1964); and in *French* v. *Banco Nacional de Cuba*, 23 N.Y.2d 46, 51 (1968). Occasionally (as in times of civil strife), the step is not formal. But, even in such cases, there is always an affirmative step evidencing the intentional use of sovereign power. See *Underhill* v. *Hernandez*, 168 U.S. 250 (1897) (house arrest by military commander during civil war); *Oetjen* v. *Central Leather Co.*, 246 U.S. 297 (1918) (forcible seizure of property by military commander during civil war); and *Ricaud* v. *American Metal Co.*, 246 U.S. 304 (1918) (same).

Here, no step was taken by the Cuban interventors or any other responsible authority of the Republic of Cuba. Moreover, their failure to act—by way of confiscation or otherwise—was perfectly consistent with their continued refusal to admit receipt of the funds Whatever the evidentiary worth of counsel's statements that his client would not honor Petitioner's claim, they proved nothing more than the fact that Cuba was not affirmatively assuming an obligation it was contesting in court. Assuming, *arguendo*, that counsel's statements could prove anything, they pointed to no affirmative exercise whatsoever of the sovereign power of a foreign country, as has been required by every decision heretofore.

Moreover, it was equally unprecedented to equate counsel's remarks with an Act of State, whatever their content. The Court of Appeals held that the Act of State consisted of the Cuban government's "repudiation" of the obligation to return the funds, "taking the form of a failure to honor the importers' demand (which was confirmed by the Cuban government's counsel at trial)." J. App., 25a. But, as the District Court found, the only basis for the assertion that an Act of State had occurred was counsel's remarks themselves. J. App., 55a.

Once before the Second Circuit held that an in-court statement constituted evidence of a sovereign act; that holding was reversed by this Court. In *Compania Espanola de Navegacion Maritima* v. *The Navemar*, 303 U.S. 68 (1938), a verified statement by the Ambassador of Spain that his country had taken possession of a vessel was filed in court. The Court of Appeals for the Second Circuit held on the basis of that statement that the vessel was immune from judicial process. This Court held such a statement not proof of a sovereign act.

If a foreign plenipotentiary's formal and verified statement is not competent evidence of a sovereign act, surely counsel's litigating position should not constitute conclusive proof of such an act. The Court below dwelt at length on the fact that an Act of State need not be formal, but that fact does not obviate the requirements that there must be some act, that the act be that of a government official within the sovereign's territory, and that there must be competent proof of the act. All these elements are lacking here.

2. The extension of the Act of State doctrine to the facts at bar by the Court of Appeals not only was unprecedented but also was wholly unsupportable by any policy considerations which have heretofore justified the application of the doctrine. The doctrine ordinarily, of course, works an exception to the general jurisprudence of this nation which requires equal treatment to all litigants. This exception is particularly dramatic where, as in the case at bar, an innocent litigant's rights, although firmly established in law, are just as firmly eradicated in fact. Thus, we submit, the doctrine should not be invoked simply by talismanic formula; its utilization is tenable only if justified by overriding public policy.

The purposes underlying the Act of State doctrine have been variously stated to be (1) to avoid embarrassment that might result to this country's foreign relations if our courts denied validity to the acts of officials of another state that would be valid in their land (see Restatement 2d, Foreign Relations Law of the United States, § 41, Comment c; *First Nat'l City Bank* v. *Banco Nacional de Cuba*, 406 U.S. 759, at 763-765 and 774 [1972]) and (2) to not subject to judicial treatment what, in cases such as expropriations, are "political questions" (see *First Nat'l City Bank* v. *Banco Nacional de Cuba, supra*, at 785-789 [dissenting opinion]).

Clearly neither policy was served by application of the doctrine here. Surely no embarrassment to our foreign relations can be feared because of a decision which merely conflicts with counsel's litigating position. Without far more convincing evidence of an act of the Cuban government itself, it is simply absurd to suggest that an affirmative judgment against that government could somehow embarrass the relations (actual or potential) between the two countries.

The policy of not adjudicating "political questions" is likewise not served by allowing counsel to invoke the Act of State doctrine without any underlying analysis of whether facts exist justifying its application. The considerations which impel application of the Act of State doctrine because of judicial reluctance to pass upon "political questions" in cases such as foreign expropriation or military seizure are hardly applicable to a case in which there has been no act by a foreign authority. Moreover, we do not deal here with subject matter—such as expropriation or activities under military occupation—which have controversial political implications in the in-

ternational arena. Here, at most, the possibility was raised that Cuba would refuse to pay a simple debt arising out of a straightforward commercial transaction—a transaction that could not conceivably present any thorny political questions. And indeed both the District Court and the Court of Appeals actually decided the legal issues which fully determine the rights of the parties. Only the award of a judgment in accordance with those rights was deemed precluded by the spectre that Cuba might not honor that judgment, not by proof of any act of Cuba that would make such a judgment embarrassing or that would require the courts to become entangled in difficult political questions.

In effect, therefore, the Court of Appeals granted Cuba sovereign immunity to the extent of refusing to award any affirmative judgment against it. The Court simply assumed that Cuba's possible refusal to recognize liability for this claim precluded our courts from requiring Cuba to do so. Yet had Cuba attempted to raise the defense of sovereign immunity, it would have been met with at least three responses: (1) the doctrine is not available with respect to commercial activity such as the sale of goods; (2) the doctrine is not available with respect to a counterclaim, regardless of amount, arising from the same subject matter as that sued upon; and (3) the doctrine cannot be invoked after the merits of the controversy (here, Cuba's receipt of the moneys paid) have been placed in issue. See, respectively, Restatement 2d, Foreign Relations Law of the United States, §§ 69, 70 (2)(b), and 71(1). These responses all arise from the trend of modern decisions, limiting immunity when the sovereign seeks the aid of our courts or when the sovereign seeks immunity in the context of mercantile, non-governmental activity.

The doctrines of sovereign immunity and Act of State arise from a common source and similar policy considerations. See *First Nat'l City Bank* v. *Banco Nacional de Cuba*, 406 U.S. at 762-763. It is clear, however, that the extension of the Act of State doctrine by the Court of Appeals has obliterated all restraints on the sovereign

immunity defense. Under the Court of Appeals' holding, counsel for a foreign government need only advise our courts that his client will refuse to honor a claim or an adverse ruling. Regardless of the nature of the case, our courts will then be precluded from acting because an "Act of State" will have occurred.

3. The implications of the holding of the Court of Appeals are far-reaching. If that holding is followed, any dispute arising out of a commercial transaction with a foreign government can be immunized from full judicial review in the courts of the United States. A simple statement by counsel for the foreign government will be sufficient to trigger the Act of State doctrine and thus divest our courts of the power to resolve the controversy against the foreign government. We are entering an era marked by a vast increase in commercial dealings between United States nationals and foreign governments—often involving transactions of massive proportions. Under the holding of the Court of Appeals, in disputes arising out of such transactions, our courts will always be available to grant relief against the American national, but, with a word from opposing counsel, never in his favor.

Already the impact of the decision below is being felt, in a case involving far more than the approximately $100,000 at issue here. In *Bank of Boston* v. *Banco Nacional de Cuba*, 61 Civ. 2116 (S.D.N.Y.) (decision pending), plaintiff bank's Cuban branches were nationalized. It brought suit to recover for payments it had made on letters of credit issued by its Cuban branches shortly before nationalization. After trial, and after post-trial briefs were submitted, the trial judge called for supplementary briefs on the impact of the Act of State holding in the instant case, adding that the question raised by that holding "quite understandably [was] not covered in the briefs" of the parties.*

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* Letter to counsel from Hon. Frederick vP. Bryan (U.S.D.J.) dated January 14, 1974, 61 Civ. 2116 (S.D.N.Y.).

Counsel in that case has again interposed an Act of State claim without evidence of any affirmative action in Cuba—this time against plaintiff's contention that the position is directly contrary to a decree of the Cuban government which assumed the obligations sued upon. Plaintiff's Supplemental Post-Trial Brief, pp. 5-6. That contention simply emphasizes the uncertainty which will be created if the Court of Appeals decision is left unreviewed.

The holding below has not merely decided a federal question of great substance in a way totally in conflict with applicable decisions of this court, but has placed in question all the policy grounds upon which the Act of State cases have been decided and upon which modern limits to the doctrine of sovereign immunity have been based. The decision has ominous implications for all future commercial disputes involving foreign governments which come before the courts of the United States. It should not stand unexamined.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue in this case to review the judgment and opinion of the Second Circuit.

February 21, 1974

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